Supreme Court of the United States

OCTOBER TERM,

442

No. 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, deceased, APPELLANTS.

vs.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Involving the power of Congress to tax the franchises of a State corporation chartered to operate a rapid transit railroad owned by the City of New York.

BRIEF FOR APPELLANTS.

RICHARD REID ROGERS,
Of Counsel for the Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, NO 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF GEORGE BATY BLAKE, DECEASED, APPELLANTS.

VS.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for Appellants.

In 1891 the Legislature of the State of New York enacted a law known as the "Rapid Transit Act" (Laws of 1891, Chapter 4), whereby it was provided that cities having a population in excess of one million inhabitants, through Boards to be known as Rapid Transit Commissioners, might establish routes, obtain the necessary consents of the local authorities and property owners, prepare plans and specifications, and enter into contracts for the construction of underground rapid transit railroads. Under a subsequent provision of the law (Law of 1894, chapter 752, section 63), authorizing the submission of the question to the people, the citizens of New York City determined

that the subways of that City should be constructed for and at the expense of the City. A contract was thereupon entered into with one John B. McDonald for the construction of the subways and their maintenance and operation, for a period of 50 years. Sections 11 to 24, inclusive, of the Rapid Transit Act, contemplated, however, the organization of a corporation "to construct and operate such rapid transit railway or railways and to enjoy and exercise the rights and privileges and franchises in this Act provided for." Under authority of this provision the respondent was therefore incorporated upon May 6, 1902, and on July 10, 1902, under authority of law, received from McDonald an assignment of the operating part of his contract with the City, the construction part of which was carried out by McDonald in person. The Interborough Company thereupon provided the equipment necessary for the operation of the subways and since that time has been exclusively engaged in the rapid transit business in New York City. Section 35 of the Rapid Transit Act, under which the subways were constructed and the Respondent incorporated, provided that the corporation contracting to operate the subways "shall be exempt from taxation with respect to its interest under said contract and with respect to the rolling stock and all other equipment of said road"; and this exemption has been sustained by the Courts of New York in the case of the *People ex. rel. Interborough Rapid Transit Company* v. *State Board of Tax Commissioners*, 126 App. Div., 610, s. c. 195 N. Y., 618. Since the original subway was put into operation, an extension thereof under the East River into Brooklyn has been constructed and is now likewise operated by the respondent. The respondent's capital stock has a par value of $35,000,000, and its average fixed indebtedness during the year ending December 31,

1909, was $36,677,667. The tax that the company would be compelled to pay for the last calendar year, after making all deductions to which it would be entitled under the Act of Congress imposing the special excise tax upon corporations, would exceed $50,000.

The appellants, stockholders of the respondent, and representing a large majority of the stockholders of that company, believing that the tax imposed upon the company by the Act in question was both unconstitutional in its general aspects, and if not broadly unconstitutional was at least unconstitutional in so far as it applied to the Interborough Rapid Transit Company, an agency of the State Government engaged in carrying on a public undertaking, requested the Directors not to make the return nor to pay the tax required by the law in question. The Directors having in view, however, the fact that the constitutionality of the law, either generally speaking, or with respect to this particular company, had not been passed upon by any court of competent authority, declined to subject the corporation to the penalties imposed by the law for failure to comply therewith. The present proceeding was thereupon taken out and the case has been brought into this court. The error assigned is the unconstitutionality of the Act of Congress of August 5, 1909.

In view of the large number of counsel who will appear in other cases before this court involving the same general questions, it is not proposed in this brief to argue all of the aspects of this case from which it might appear that the Act of Congress of August 5, 1909, was unconstitutional. On this particular appeal the discussion will be confined to the following propositions:

(1) The Act of Congress is unconstitutional, inasmuch as in effect it imposes a tax upon the reserved powers of the States to create corporations

and endow them with franchises which are in themselves attributes of sovereignty.

(2) The Act of Congress is unconstitutional with especial respect to the Interborough Rapid Transit Company, the respondent herein, inasmuch as it imposes a tax upon a public agency engaged in carrying on a municipal, and therefore, under the decisions of this Court, a State enterprise.

(3) The Act of Congress is unconstitutional insofar as it attempts to impose a tax upon the franchises of foreign corporations, or at least upon their right to carry on a purely intra-state business — a matter over which the Federal Government has no control. The whole Act, therefore, must fail, inasmuch as it cannot be assumed that Congress intended to pass a law which would place state corporations at a disadvantage with respect to foreign corporations engaged in the same character of business.

(4) The tax is so unequal that by definition it is not such a tax as Congress has the delegated power to impose.

The argument of this brief will be centered principally upon the second of the foregoing propositions.

Nature of the Tax.

The Act of Congress provides generally that every corporation "shall be subject to pay a special excise tax with respect to the carrying on or doing business by such corporation, equivalent to 1 per centum upon the entire net income over and above $5,000 received by it from all sources during the year." Is the tax thus imposed (a), a tax upon corporate income; (b) an occupation tax; (c) a tax

upon franchises as property; or (d) a tax upon the existence of corporations or partnership associations as such, or, as it is sometimes expressed, a tax upon the right to do business in a corporate or associated form?

If, following the suggestion of this court in the case of *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S., 580, 583, the substance and not the letter of the Statute be regarded and the tax be looked upon as a tax upon *income*, it must necessarily follow that the tax is unconstitutional because in many cases it will be found to be a tax upon the income of corporations derived from real or personal property or municipal securities or other property beyond the taxing power of Congress, and is not apportioned among the States according to population. In the particular case of the Interborough Rapid Transit Company, if the tax be a tax imposed upon its income, it is proper to point out that its income is derived almost exclusively from its special franchises, and that these franchises are expressly declared by the laws of the State of New York (Laws of 1896, chapter 908, subdivision 3, as amended by Laws of 1899, chapter 712) to be real estate.

The tax, however, in terms, purports to be "a special excise tax with respect to the carrying on or doing business" by corporations. If a tax imposed upon the deposits of a savings bank is a tax upon the franchise of the bank, as was held in *Society for Savings* v. *Coit*, 6 Wall., 594, or, if a tax upon the accounts of depositors equal to a given percentage of the amount of the deposits is likewise a franchise and not a property tax, as was held in *Provident Institution* v. *Massachusetts*, 6 Wall., 611, or if a tax upon the dividends or coupons payable by a corporation is an excise tax on the corporation as was held in *R. R.* v. *Collector*, 100 U.

S., 595, 598, it would seem that a tax which by its terms, purports to be an excise tax, should be so regarded. Assuming then that the tax in controversy is an excise tax and, therefore, need not be apportioned among the States according to population, the particular thing upon which this excise tax is imposed, remains to be considered.

In this aspect it seems certain that the tax cannot be considered an *occupation* tax, such as was the tax imposed upon "every person, firm, corporation or company carrying on or doing business of refining sugar," which was considered by this Court in *Spreckles Sugar Refining Co.* v. *McLain*, 192 U. S., 397, and held to be an excise tax "in respect of the carrying on or doing business of refining sugar." The law clearly does not impose any tax upon any business or any occupation as *such*. This follows not only from the obvious fact that no business or occupation is specified, but also from the circumstance that if any occupation or business were in fact subjected to the tax, every person engaged in that occupation or business would have to pay it, whereas under the law as it stands, only corporations and joint stock companies or associations pay the tax, and that quite irrespective of the business or occupation in which they may be engaged.

Neither does it seem possible to infer that the tax imposed by the Act of Congress is a tax upon corporate franchises as *property*. It is undoubtedly true that the courts have recognized the distinction between the sovereign franchises of a corporation, or its right to be a corporation, and the special franchises enjoyed by it which are treated as property and which may be separately taxed. *Farrington* v. *Tenn.*, 95 U. S. 679, 687; *Veazie Bank* v. *Fenno*, 8 Wall., 533, 548. But if this be true, it is nevertheless manifest that corporate franchises under the Act of Congress under consideration are not taxed

as property, inasmuch as, quite to the contrary, the language of the Act imposes an excise tax upon corporations with respect to their carrying on or doing business. If the tax were indeed a *direct* tax upon franchises as *property*, it would then follow that the law must be unconstitutional, particularly with respect to the corporation involved upon this appeal, because the tax is not apportioned according to population. The principal franchise enjoyed by the Interborough Company, is its franchise to operate a public service rapid transit railroad under the streets of the City of New York; and this franchise, as already stated, has been expressly declared by the State of New York to be real property.

The tax, therefore, can only be a indirect tax upon the right to do business as a corporation; and such, indeed, is the tax by the definition of the statute itself.

We are thus brought to the consideration of the first point.

I

THE ACT OF CONGRESS IS UNCONSTITUTIONAL, INASMUCH AS IN EFFECT IT IMPOSES A TAX UPON THE RESERVED POWERS OF THE STATES TO CREATE CORPORATIONS AND ENDOW THEM WITH FRANCHISES WHICH ARE IN THEMSELVES ATTRIBUTES OF SOVEREIGNTY.

The tax in terms is a tax imposed upon corporations with respect to their carrying on or doing business; but it is obvious that it is really a tax upon the power of the State governments to *create* corporations, inasmuch as if a corporation can be taxed as such for carrying on its business as a corporation, and if the power to tax involves, as has been so often stated by this Court, the power to de-

stroy, then, necessarily, the power of States to create corporations may likewise be destroyed under the guise of a similar taxation.

For of what value would be a grant of corporate franchises to a private corporation, if the corporation in the very act of enjoying those franchises could be taxed out of existence? The argument at this point clearly falls under the principle so often asserted by this Court, and aptly stated by Justice BROWN, in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S., 601, 691, that "a tax upon an incident to a prohibited thing is a tax upon the thing itself; and if there be a total want of power to tax the thing, there is an equal want of power to tax the incident." See *Brown* v. *Maryland*, 12 Wheat., 419, holding that a license tax upon an importer was a tax upon imports; *Weston* v. *Charleston*, 2 Pet., 449, that a tax upon stock for loans to the United States was a tax upon the functions of the Government; *Dobbins* v. *Commissioners*, 16 Pet., 435, that a tax upon the salary of an office was a tax upon the office itself; *Passenger Cases*, 7 How., 283, that a tax upon alien passengers arriving in ports of the State was a tax upon commerce; *Almy* v. *California*, 24 How., 169, that a stamp tax upon bills of lading was a tax upon exports; *Crandall* v. *Nevada*, 6 Wall., 35, that a tax upon railroads and stage companies for every passenger carried out of the State was a tax on the passenger for the privilege of passing through the State; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S., 34, that a tax upon Pullman cars running between different States was a tax upon interstate commerce; *Leloup* v. *Mobile*, 127 U. S., 640, that a license tax upon telegraph companies was likewise a tax upon interstate commerce; and *Cook* v. *Pennsylvania*, 97 U. S., 566, that a tax upon the sale of goods was a tax upon the goods themselves.

Now, that a grant of a corporate franchise is, (a) the exercise of a sovereign faculty, and (b) that this power was not alienated by the several States to the national Government, are propositions too plain for discussion.

a. In *California* v. *Pacific R. R. Co.*, 127 U. S., 1, 40, Justice BRADLEY, speaking for this Court, inquired:

> "What is a franchise? Under the English law, Blackstone defines it as 'a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject.' (2 Bl. Com., 37.) Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No

> persons can make themselves a body corporate and politic, without legislative authority. Corporate capacity is a franchise."

b. Upon the other hand, in *Briscoe* v. *Bank of Comth. of Ky.*, 11 Peters, 257, this Court held that a State possessed the power to charter a bank, that the power was an incident to sovereignty, and that there was no limitation in the federal Constitution on its exercise by the State.

The language of the dissenting judges in *Veazie Bank* v. *Fenno*, 8 Wall., 533, 555, is likewise pertinent in this connection, inasmuch as on this point they did not express a doctrine upon which the majority was in disagreement with them. After commenting upon the effect of the decision in *Briscoe* v. *Bank of the Commonwealth of Ky.*, as stated above, they went on to say:

> "As we have seen, in the forepart of this opinion, the power to incorporate banks was not surrendered to the Federal Government, but reserved to the States; and it follows that the Constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them. The question as to the taxation of the powers and faculties belonging to governments is not new in this Court."

The justices complained that the effect of the main decision was not only to strike down the power to create banks, but

> "the power to create any other description of corporations, such as railroads, turnpikes, manufacturing companies, and others,"

and that the

> "taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority."

The main opinion in *Veazie Bank* v. *Fenno*, evaded this issue, although it conceded that when franchises were conferred for the purpose of giving effect to some reserved power of a State they were not proper objects for taxation.

If, then, the tax is essentially a tax imposed upon the full enjoyment of a sovereign prerogative, and is therefore, a tax upon the exercise by the sovereign of the right to confer that prerogative; if this right is a reserved right of the several States under the Constitution; and if the Federal taxing power, though comprehensive in terms, is yet so circumscribed that it cannot be employed to destroy the exercise by the States of a sovereign function;—it necessarily follows that the law in question is unconstitutional.

A fresh light, however, will be thrown upon this subject, if we consider those cases in which it has been held that the States cannot even *indirectly* tax a corporate franchise granted by the national Government; and then turn to the consideration of the converse proposition that a franchise of the Federal Government is entitled to no greater protection from the States than is a franchise of any one of the States from the Federal Government.

McCulloch v. *Maryland*, 4 Wheat., 316, holding that the State of Maryland might not tax the notes of the banks of the United States, is the earliest

and the greatest case which establishes the first postulate of this syllogism. But there are others—*Osborne* v. *Bank of U. S.*, 9 Wheat., 768; *Brown* v. *Maryland*, 12 Wheat., 419; *Weston* v. *The City of Charleston*, 2 Pet., 449; *Bank of Commerce* v. *New York*, 2 Black., 628; *Bank Tax Case*, 2 Wall., 200; *Owensboro National Bank* v. *Owensboro*, 173 U. S., 664; *Davis Bank of Louisville* v. *Stone*, 174 U. S., 932; culminating in *California* v. *Pacific R. R., Co.*, 127 U. S., 41—perhaps even more pertinent. How firmly the doctrine has been established by this Court, may be gathered from the forcible language employed by Justice BRADLEY, in delivering the opinion of the Court in the case last mentioned:

> "Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States, may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject."

This case, it should be borne in mind, was not a case involving the protection of the corporate powers of a corporation of the United States, but the protection of a franchise—a franchise to extend its road as a connecting link of interstate commerce from California to Utah—that was bestowed upon a State corporation by an Act of Congress. The foregoing passage from Justice BRADLEY's opinion was quoted with approval by this Court in *Central Pacific R. R. Co.* v. *California*, 162 U. S., 91, 124, where the Court concluded:

> "Thus it was reaffirmed that the property of a corporation of the United States might be taxed, though its franchises, as, for instance, its corporate capacity and its power to transact its appropriate business and charge therefor, could not be."

In view of these decisions, it would seem to be impossible to doubt the invalidity of an Act of the State of New York, which, over the objection of the Congress of the United States, might impose a tax upon a corporation organized by the United States for the purpose of building, let us say, an interstate railroad through the State of New York, with respect to "the carrying on or doing business by such corporation." See *Leloup* v. *Port of Mobile*, 127 U. S., 640, 648. Indeed, the decisions of this Court may be said to establish the proposition that, while the franchises of a corporation of the United States may never be taxed by a State government, not even the property of a corporation of the United States may be taxed if Congress should declare it to be exempt.

In *Thomson* v. *Pacific R. R.*, 9 Wall., 579, 588, Chief Justice CHASE, delivering the opinion of the Court, said:

> "We do not doubt, however, that upon the principles settled by that judgment (*McCulloch* v. *Maryland*), Congress may, in the exercise of powers incidental to the express powers mentioned by counsel (power to regulate commerce and establish post-offices and post-roads), make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; *and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them.*"

And in *Central Pacific R. R.* v. *California, supra*, the Court was careful to say:

> "Of course, if Congress should think it necessary for the protection of the United States to declare such property exempt [the property of federal corporations] that would present a different question."

But if a State government cannot tax the franchises or operations of a national corporation chartered to assist the National Government in the discharge of a delegated power, by what better right may the National Government tax the franchises or operations of a State corporation chartered to assist a State Government in the discharge of a reserved power?

If any rule of correlative limitations between the Government of the United States and the governments of the respective States were well established, it would seem to be this: that in the respect stated, the State and Federal Governments are upon an equal footing. The authorities to this effect are numerous and to the point: *Collector* v. *Day*, 11 Wall., 113, 128; *R. R. Co.* v. *Peniston*, 18 Wall., 30; *Van Brocklin* v. *Tenn.*, 117 U. S., 151, 162; *The Income Tax Cases*, 157 U. S., 584; *Knowlton* v. *Moore*, 178 U. S., 41, 59; *Ambrosini* v. *U. S.*, 187 U. S., 1, 7; and *South Carolina* v. *U. S.*, 199 U. S., 487. They will be considered in detail in the discussion of the succeeding point of this brief. They may be said, however, to be epitomized in the early statement of the Court in *R. R. Co.* v. *Peniston*, 18 Wall., 1, 30, that:

> "While it is true that Government (the Government of the United States) cannot exercise its powers of taxation so as to destroy the State governments, or embarrass

> their lawful action, it is equally true that the States may not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the national Government."

It would, therefore, seem to follow that under the principle of reciprocity which forbids a State Government from taxing the franchises of a federal corporation, or its operations, the Federal Government is equally inhibited from taxing the franchises or operations of a corporation organized under the laws of one of the several States.

II.

THE ACT OF CONGRESS IS UNCONSTITUTIONAL WITH ESPECIAL RESPECT TO THE INTERBOROUGH RAPID TRANSIT COMPANY, THE RESPONDENT HEREIN, INASMUCH AS IT IMPOSES A TAX UPON A PUBLIC AGENCY ENGAGED IN CARRYING ON A MUNICIPAL, AND THEREFORE, UNDER THE DECISIONS OF THIS COURT, A STATE ENTERPRISE.

The argument of the preceding point has been broad enough, if sound, to cover the case of all corporations organized under the laws of any State, in whatever business they may be engaged. It is now proposed to consider the special case of the Interborough Rapid Transit Company, and to show that, whatever the general rule, this company falls within the particular rule established by this Court, that Congress has not the power to tax the franchise of a State corporation expressly created for the purpose of carrying on a public work, and expressly exempted from taxation with respect to such portion of its property as may be engaged therein.

If, as has been held by numerous decisions of this Court, a railroad chartered by the Congress of the United States, employed to transport the mails of the United States, or its troops and munitions of war, and engaged in conducting broadly an interstate commercial business, notwithstanding the fact that its existence is due to private initiation, and its profits are distributed to private investors, is nevertheless an agency of the Federal Government, so that its right to exist and carry on its work cannot be taxed by any State government—upon what ground can it be justly claimed that the corporation involved in this appeal—the Interborough Rapid Transit Company—is not likewise a governmental agency engaged in carrying on a public enterprise for the City of New York? It has long since been established by the decisions of this Court that a municipality is but the arm of a State government, that a municipal undertaking is a public undertaking of the State itself, and that, therefore, municipal property and municipal agencies enjoy the same protection from Federal taxation as the property and agencies of the State of which the municipality is a mere subdivision. If any authority were needed to show that the Interborough Rapid Transit Company is a public agency in the broadest sense, in a sense equally as broad as that in which the Pacific Railroad companies for example have been asserted to be Federal agencies—it will be found in the Acts of the Legislature of the State of New York, which authorized it to be incorporated for the express purpose of bringing to the great metropolis of that State the sorely needed relief of rapid transit; and in the further provisions of the law, exempting from taxation, not only its personal property employed in the operation of the subways, its machinery, rolling stock and equipment, but also its contract interest in the road itself. This

exemption from taxation and the public character of this company have stood the test of the courts of the State of New York. In *People, ex rel., Interborough R. T. Co.* v. *Tax Commissioners*, 126 App. Div., 610, affirmed without opinion by the Court of Appeals of New York, there was involved the right of the Interborough Company to be exempt with respect to its special franchise to operate a railroad under the streets of New York City. The language of the Appellate Division in that opinion fully states the Company's case:

> "A special franchise of a railroad is its right to construct, maintain and operate a railroad in public streets, highways or public places. (*People, ex rel., Met. St. R. Co.* v. *Tax Comrs.*, 174 N. Y., 417, 435, 436.) By the Rapid Transit Law and the Acts amendatory and supplemental thereto, the special franchise as well as the road itself is the property of the City, and is merged in and became a part of the public highway for the public use.
>
> * * * * *
>
> "The City itself was not given the power of a railroad corporation, and, was, therefore, incapable, except through the contract which the statute authorized, of making this public work available for public use. For the purposes of this case it is unnecessary to determine whether the relator is technically a lessee, an operator or a separate contractor who performs a public service which the City could perform only through the agency of another, and the performance of which it was its duty to provide. However the matter is viewed, we find a public highway, operated in the manner required by the statute and the commission in charge of it, the operator paying a fixed sum to the City for the use of the property and the bal-

ance of the fares are held by it for performing the public service.

* * * * *

"If the City had been given power to operate this road, it is clear that no franchise tax could be charged against it. As the City can only operate it through another, it would seem to follow that the operator for the City is also exempt from taxation. The general scheme of the statute under which this subway was built was: The City bonded itself to pay for the construction of the road, which bonds, with interest thereon, are to be paid by the operation of the road, so that at the end of the lease or contract for operation, the City will own the road free of cost. It was, therefore, necessary, in order to make the scheme available, to find a contractor who would agree to construct, maintain and operate the road upon terms which the statute permitted the City to make. A statute declaring the property of a municipality free from taxation, which property it can only use through the services of a special contractor or lessee, confers no benefit upon the City if the contractor or lessee is to be taxed for using the property, as the amount of the tax would necessarily affect the rental which the City may receive. The statutory exception, therefore, is meaningless, unless it exempts the property from taxation when applied to the only use and in the only manner in which the City could use it."

We, therefore, have in the present case not only an appropriate agency of the State for the purpose of carrying on a public enterprise, but an indispensable agency; for the municipality, as stated by the Appellate Division, had not the authority to operate the road itself, and the Rapid Transit Act of the State of New York provided that it could be operated only by a corporation organized under that Act.

Nor is the exemption from taxation important only as showing the public character of the Interborough Company. It is likewise important as an inhibition. If it be true, as stated in the cases cited under the foregoing point, that even the property owned in a private capacity by a corporation organized by the Government of the United States and engaged in a national undertaking cannot be taxed by a State, if the Federal Government should so declare, the statement is justified by the parity of reasoning which pervades the consideration of this whole question, wherever the correlative rights of the State and Federal governments are involved, that the solemn declaration of the State of New York that this corporation should not be taxed, withdraws it from the category of subjects upon which the Federal Government may justly impose an excise tax, even if that right otherwise existed.

The public character of this company having been thus defined by the legislature and the courts of New York, and being apparent from the nature of the Company, it is proper to now pass in review the cases in which the general principle has been asserted by this Court that the public agencies of a State, or of a municipality of a State, may not be taxed by the Federal Government.

In *Veazie Bank* v. *Fenno*, 8 Wall., 533, 547, where the Supreme Court sustained a tax of 10 per cent. upon the notes of State banks issued for circulation, upon the ground that the tax was a property tax, the Court nevertheless safeguarded the rights of the State in a situation, whereof the present case is a concrete example, by saying:

> "It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agen-

> cies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress."

In *The Collector* v. *Day*, 11 Wall., 113, 125, it was held that the salary of a state judge was exempt from national taxation. The Court said:

> "It would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits, but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

In *United States* v. *Railroad Company*, 17 Wall., 322, was involved the right of the Federal Government to impose a tax on money due from the Baltimore & Ohio Railroad Company to the City of Baltimore. It was held that the City was a part of the State in the exercise of a limited portion of the State's powers and that the tax could not be sustained. The Court said (p. 327):

> "The right of the States to administer their own affairs through their legislative,

> executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization * * *

To the same effect was *United States* v. *Louisville*, 169 U. S., 249.

In *Mercantile Bank* v. *New York*, 121 U. S., 138, 162, it was held that the United States could not tax the bonds issued by a State, or under its authority, and held by private corporations.

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S., 429, 584, the only point upon which the entire court concurred, was upon the lack of authority to include as taxable income the income derived from interest on municipal bonds.

The foregoing cases on principle seem to be in point; but on the facts it may be admitted they are not so applicable to the situation of the Interborough Company as are those cases in which it has been held that a privately owned bank, organized under the laws of the United States by virtue of its power to regulate the currency, or a privately owned railroad company, chartered by Congress in the exercise of its power to regulate commerce between the States, is such an agency of the Government, that neither its franchises, its operations, nor, if so declared by Congress, its separately owned property, may be taxed by a State government.

These cases have already been partly cited in detail. Their general doctrine may be said to be aptly summarized by Chief Justice CHASE in *Van Allen* v. *The Assessors*, 3 Wall., 573, 591:

> "That Congress may constitutionally organize or constitute agencies for carrying into effect the national powers granted by the Constitution; that these agencies may be organized by the voluntary association of

> individuals, sanctioned by Congress; that Congress may give to such agencies, so organized, corporate unity, permanence, and efficiency; and that such agencies in their being, capital, franchises, and operations, are not subject to the taxing power of the States, have ever been regarded, since those decisions, as settled doctrines of this Court."

So likewise in *R. R. Co.* v. *Peniston*, 18 Wall., 1, 46, Justice BRADLEY, in his dissenting opinion, said:

> "Now, I think it cannot be doubted at the present day, whatever may have been contended in former times, that the creation of national roads and other means of communication between the States, is within the power of Congress in carrying out the powers of regulating commerce between the States, establishing post-offices and post-roads, and in providing for the national defense and for military operations in time of war. And no one will contend that, if the creation of a corporation is a suitable agency and means of carrying on the financial operations of the government, the creation of a corporation is equally apposite as an agency and means of carrying out the objects above mentioned."

And in *Luxton* v. *North River Bridge Co.*, 153 U. S., 525, 529, Justice GRAY, delivering the opinion of the Court, said:

> "The Congress of the United States, being empowered by the Constitution to regulate commerce among the several States, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end.
>
> * * * * * *
>
> "Congress, therefore, may create corpora-

> tions as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States."

See also in *U. S.* v. *Stanford*, 161 U. S., 412, and *U. S.* v. *Union Pacific R. R. Co.*, 91 U. S., 92.

Indeed, the analogies to be drawn from the decisions on federal franchises so completely cover the case of the Interborough Company that it becomes important to inquire more minutely than heretofore to what extent the rule of reciprocity as to the mutual exception of the governmental agencies of one government from taxation by the other has been established by the decisions of this Court. That a complete reciprocity does exist, notwithstanding an earlier dictum to the contrary, we think may now be said to be firmly settled by the force of the following authorities:

In *Collector* v. *Day*, *supra*, the whole decision was rested upon the application to the States of the converse of the proposition settled in *McCulloch* v. *Maryland*, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." Having first adverted to the dual system of State and Federal government under our Constitution the Court proceeded to say:

> "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed

for carrying on the operations of their go
ernments * * * should be left free an
unimpaired, should not be liable to be cri
pled, much less defeated by the taxin
power of another government, which powe
acknowledges no limits, but the will of th
legislative body imposing the tax." * *

"And if the means and instrumentalitie
employed by that government to carry int
operation the powers granted to it are, ne
essarily, and, for the sake of self-preserv
tion, exempt from taxation by the State
why are not those of the States dependin
upon their reserved powers, for like reason
equally exempt from Federal taxation
Their unimpaired existence in the one cas
is as essential as in the other. It is ad
mitted that there is no express provision i
the Constitution which prohibits the ge
eral government from taxing the means an
instrumentalities of the States, nor is ther
any prohibiting the States from taxing th
means and instrumentality of that go
ernment. In both cases the exemptio
rests upon necessary implication, an
is upheld by the great law of sel
preservation; as any government, whos
means employed in conducting its op
erations, if subject to the control o
another and distinct government, can exis
only at the mercy of that government. O
what avail are these means if another powe
may tax them at discretion?"

The scope of this decision and the pertinency o
the principle to the exact issue presented on th
appeal may be gathered from the dissent of Justic
BRADLEY, wherein he queries—

"Where are we to stop in enumerating th
functions of the State governments whic
will be interfered with by federal taxation
If a State incorporates a railroad to carr
out its purposes of internal improvement, o

> a bank to aid its financial arrangements reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation?"

The reciprocity rule was next asserted in the case of *Railroad* v. *Peniston*, 18 Wall., 30, as follows:

> "While it is true that government (meaning the government of the United States) cannot exercise its powers of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government."

In *Van Brocklin & Another* v. *State of Tennessee & Others*, 117 U. S., 151, 162, the Supreme Court quoted with approval the statement of the reciprocity rule in *Fagan* v. *Chicago*, 84 Illinois, 227, 233, 234, as follows:

> "Nor under our system of government can the State tax the general government, its agents or property, nor can the general government tax the States, their agents or property."

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S., 429, 584, the rule was stated thus:

> "As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

In *Knowlton* v. *Moore*, 178 U. S., 41, 59, the doctrine of reciprocity was recognized in the following language:

> "This proposition is supported by a reference to decisions holding that the several States cannot tax or otherwise impose burdens on the exclusive powers of the National government or the instrumentalities employed to carry such powers into execution, and, conversely, that the same limitation rests upon the National government in relation to the powers of the several States."

In *Ambrosini* v. *United States*, 187 U. S., 1, 7, it was held that good behavior bonds required to be given by liquor dealers to the City of Chicago, were exempt from the stamp tax imposed during the Spanish-American War. The Court said:

> "The general principle is that the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the Federal Government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter."

Even in the case of *South Carolina* v. *United States*, 199 U. S., 452, 453, 454, a case to which more extended reference will be hereafter made, it was fully recognized that:

> "the two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers."

and that

> "Each State is subject only to the limitations prescribed by the Constitution and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that 'the United States shall guarantee to every state in this Union a republican form of government.' Art. 4, sec. 4. That expresses the full limit of National control over the internal affairs of a State."

It does not seem possible that the case of *South Carolina* v. *United States*, *supra*, was intended to establish an opposite rule or that in view of the many decisions already cited to the contrary, it can be cited as an authority for the proposition, that the particular corporation involved in the case under discussion, to wit, The Interborough Rapid Transit Company, cannot be properly looked upon as an instrument employed by the State, "in the discharge of its ordinary functions as a government." It is true that in that opinion, although against strong dissent, it was stated that the decisions already referred to seemed to indicate that the thought had been that the exemption of State agencies and instrumentalities of National governments was limited to those of a strictly governmental character, and did not extend to those which were used by the State in carrying on an ordinary private business. But assuming the correctness of this conclusion when applied to the case where the State or municipality engages in a private business primarily and principally for the sake of profit, it certainly has no application, unless the force of all the decisions heretofore adverted to be waived aside, to the case where the State or municipality derives no direct profit

from a special enterprise and where the enterprise itself is carried forward in order to promote an important public undertaking properly falling within the domain of the State's powers of internal regulation. The analogy so often referred to between the Pacific railroads and the subways of New York City is complete. In the case of Pacific railroads the actual profits from operation, as here, went chiefly to the corporations expressly chartered to carry on their operation, but so essential were they thought to be to the discharge of the general obligation assumed by the National government to foster and promote intercourse between the States, that the point was never seriously urged that they were not appropriate instrumentalities of National government to the accomplishment of that end. It is now too late to insist that a railroad built by a great City, owned by that City, and affording an absolutely indispensable facility for the daily intercourse of its citizens, is not likewise within the narrower limits of the internal affairs of State or City, which is an arm of the State, an appropriate agency of the State government. It would seem as though the case of the *United States* v. *Railroad Company*, 17 Wall., 322-330, should be conclusive upon this subject.

The City of Baltimore had subscribed to the bonds of the Baltimore & Ohio Railroad Company, and it was held that these bonds were beyond the power of the Federal Government to tax. Referring to the public character of this investment, this Court said:

> "That the State possessed the power to confer this authority upon the City, we see no reason to doubt.
>
> "Was it exercised for the benefit of the municipality, that is in the course of its

municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the City of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power? The legislature and the authorities of the City of Baltimore decided that the investment of $5,000,000 in aid of the construction of a railroad, which should bring to that City the unbounded harvests of the west, would be a measure for the benefit of the inhabitants of Baltimore and of the municipality. This vast business was a prize for which the States north of Maryland were contending. Should it endeavor by the expenditure of this money or this credit to bring this vast business into its own State, and make its commercial metropolis great and prosperous, or should it refuse to incur hazard, allow other States to absorb this commerce, and Baltimore to fall into an inferior position? This was a question for the decision of the City under the authority of the State. It was a question to be decided solely with reference to public and municipal interests. The City had authority to expend its money in opening squares, in widening streets, in deepening rivers, in building common roads or railways. The State could do these things by the direct act of its legislature, or it could empower the City to do them. It could act directly or through the agency of others. It is not a question to be here discussed, whether the action proposed would in the end result to the benefit of the City. It might be wise, or it might prove otherwise. The City was to reap the fruits in the advanced prosperity of all its material interests, if successful. If unsuccessful, the City was to bear the load of debt and taxation, which would surely follow. The City had the power given it by the legislature to de-

cide the question. It was within the scope of its municipal powers."

The authority of this case was crystallized into legislation by the Act of Congress of February 25, 893 (27 Stats., 477), directing a refund to the City of Louisville of the federal tax imposed under the Internal Revenue Act of 1864, upon the stock of the Louisville and Nashville R. R. Co. owned by the City. See *United States* v. *Louisville*, 169 U. S., 249.

Much other authority upon this point could be cited, but the power of subdivisions of a State Government, either counties, townships, or municipalities, to subsidize works of internal improvement, and, most of all, public improvements which facilitate the intercourse of citizens with each other, has long been an established principle of our polity. Had the principle not been early established and fully recognized, the vast development of this land and its political subdivisions could never have been assured, or must at least have been indefinitely postponed.

And this suggestion leads to another important aspect in which the South Carolina Dispensary case may be distinguished from the case at the bar. It was there held that the Constitution should be interpreted in the light of the circumstances surrounding its framers and it was suggested that when the Constitution was adopted, "there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plan of a body politic to take up the work of the individual or body corporate." It was therefore argued that when the framers of the Constitution conferred upon the National government

the power to impose license taxes, they could not have supposed that the State governments by extending their functions to ordinary commercial operations would limit or destroy this power; but this argument can scarcely be applied with respect to the ordinary routes of communication which from time immemorial have always been looked upon as proper objects of public ownership and of public control. At the time the Constitution was adopted, the nearest approach to the railroads of today, were the public roads of that era, and these were universally under the control of the State Governments or subdivisions of the State Governments. Canals and post-roads were already under governmental protection the world over, and although the power to establish post-roads was committed to Congress, there can scarcely be a doubt that the States recognized as well as retained their rights to improve the avenues of internal communication. It cannot, therefore, be said that when the Constitution was adopted its framers did not contemplate that the power of the State might be extended to the creation of improved facilities for travel and communication, and, indeed, the Constitution was scarcely in existence when, prior to the beginning of the railroads, an extensive system of artificial water communication was put into force chiefly through the aid or by the direct appropriations of the State Governments. New York was one of the first to exercise in this respect its governmental functions, and the Erie Canal was formally proposed as a State undertaking in the year 1791.

It is now proper to advert to the distinction made by Mr. Justice BRADLEY, in his dissenting opinion in *Railroad Company* v. *Peniston*, 18 Wall., 48, relying upon an observation made by Chief Justice MARSHALL, in *McCulloch* v. *Maryland*, 4 Wheat., 405. Justice BRADLEY in endeavoring to

establish the proposition against the views of a majority of the court that not only the franchises of the Union Pacific R. R. Co., a National corporation, were exempt from State taxation, but the property owned by that corporation as well, was naturally led to consider the opposing argument that if the property as well as the franchises of a federal corporation were exempt from State taxation, the property as well as the franchises of a State corporation should likewise be exempt from Federal taxation. He stated this question as follows:

> "But, it may be asked, if the States cannot tax a United States corporation created for public and national purposes, on what principle can the General government tax local corporations created by the State governments for local and State purposes? If the States cannot tax a National bank, how can the United States tax a State bank? The answer is very manifest, and is stated by Chief Justice MARSHALL, in *McCulloch* v. *Maryland*."

The learned Justice then proceeded to quote several extracts from *McCulloch* v. *Maryland*, of which the following was the most important:

> "It has also been insisted that, as the power of taxation in the General and State governments is acknowledged to be concurrent, every argument which would sustain the right of the General government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the General government. But the two cases are not on the same reason. The people of all the States have created the General government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by

> their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

Manifestly the language employed by Chief Justice MARSHALL was unnecessary to the decision of the case before the Court. In answer to it, it can only be said that this dangerous dictum, notwithstanding the elevated source from which it proceeded, has never been applied as a principle of any decision rendered by this tribunal. Indeed, the long line of cases beginning with *Collector* v. *Day*, 11 Wall., 113, 125, summarized above, are a direct negation of this doctrine.

The third and fourth propositions set forth in the beginning of this brief may be briefly stated.

III.

THE ACT OF CONGRESS IS UNCONSTITUTIONAL IN SO FAR AS IT ATTEMPTS TO IMPOSE A TAX UPON THE FRANCHISES OF FOREIGN CORPORATIONS, OR AT LEAST UPON THEIR RIGHT TO CARRY ON A PURELY INTRASTATE BUSINESS—A MATTER OVER WHICH THE FEDERAL GOVERNMENT HAS NO CONTROL. THE WHOLE ACT, THEREFORE, MUST FAIL, INASMUCH AS IT CANNOT BE ASSUMED THAT CONGRESS INTENDED TO PASS A LAW WHICH WOULD PLACE STATE CORPORATIONS AT A DISADVANTAGE WITH RESPECT TO FOREIGN CORPORATIONS ENGAGED IN THE SAME CHARACTER OF BUSINESS.

The Act of Congress of August 5, 1909, imposes a tax not only upon corporations of the United States or any State or Territory thereof, but also a special excise tax with respect to the carrying on and doing business of any corporation organized under the laws of any foreign country.

It is a proposition too plain for comment that no state can subject a non-resident to its sovereignty. It certainly is beyond the power of the Federal government to tax the franchises, for example, of a corporation of Great Britain. If the tax upon foreign corporations, therefore, is to be sustained, it must be upon the theory that the National government has authority to license foreign corporations to do business within the geographical limits of a State of the union. Indeed, the tax in terms purports to be a tax upon the right of a foreign corporation to carry on or do business within the United States, or any State or Territory thereof. If this right can be sustained, then it clearly falls within the power of the Federal government to prohibit by taxation a foreign corporation from transacting a wholly domestic business within the limits of any

State of the United States. It can, for example, impose a tax upon the admission of a foreign Insurance Company to underwrite risks in the State of New York, and it can thus withdraw from the State the right to regulate its own internal commerce, a right which from the earliest days of the Republic has been universally conceded to lie within the sole jurisdiction and regulation of the several States. The authority of Congress to tax under any appropriate form an established business or occupation within its jurisdiction may be conceded; but it does not seem possible that any successful contention can be made that will uphold the authority of the United States to tax either the franchises of foreign companies as such or their primary right to carry on business of an exclusively domestic character within any given State. "The power to authorize a business within a state is plainly repugnant to the exclusive power of the State over the same subject." *License Tax Cases*, 5 Wall., 462, 471. See also *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S., 204, 210. The law, therefore, insofar as it applies to such companies, would seem to be unquestionably a law not lying within the delegated powers of the Federal government to enact.

But if that be true, the whole law would likewise seem to fail upon the principle sustained in the *Income Tax* cases, that where certain important sections of a law, constituting an entire scheme of taxation, are necessarily invalid, the whole law must fall, because it cannot be assumed that the Legislature would pass the residuum independently of the parts which are held to be unconstitutional. There is a special force in the application of this principle to the law in question, provided the tax upon foreign corporations cannot be enforced, as, otherwise, all foreign corporations doing business

within the confines of any State in the Union would have a distinct preference over domestic corporations—to wit, an exemption from taxation which domestic corporations could not enjoy. It certainly could not be assumed that Congress could have intended to produce any such result as this, or, that with any such situation before it, it would have enacted any part of the present scheme imposing a special franchise tax upon corporations.

IV.

THE TAX IS SO UNEQUAL THAT BY DEFINITION IT IS NOT SUCH A TAX AS CONGRESS HAS THE DELEGATED POWER TO IMPOSE.

It is true that the provision of Article I, Section 8, of the Constitution, that excise taxes must be uniform throughout the United States, has been held by this Court to mean a geographical uniformity. It is not, therefore, upon this section that the proposition is rested that the present law is unconstitutional, because unequal. The primary power delegated to the Federal government to impose taxes, carries with it the necessary implication that those taxes should be substantially uniform and equal, or, if unequal in part, that the inequality should be based upon some rational and clearly understand principle. It might be that the exemption of one particular corporation from taxation where another is taxed may stand upon a rational basis. It may be that the exemption from taxation of corporations enjoying a net income of less than $5,000 a year is a rational exemption, inasmuch as it might be assumed that such weaker corporations should be fostered and encouraged; but the inequalities in the present law

far transcend the principle of a rational inequality, and where they do not transcend that principle, clearly invade the jurisdiction reserved to the several States.

To illustrate: The present company does not enjoy the right, with other corporations, in arriving at the amount of tax it will have to pay to deduct the interest upon its bonded debt in excess of its capital stock. The only rational ground upon which this discrimination against corporations whose fixed indebtedness exceeds their capital stock can be rested, must be the ground that in the furtherance of a wise public policy it is advisable to restrict the indebtedness of corporations to an amount which shall not exceed their capital stock. This principle, indeed, has been made effective by recent legislation in several States; but the power thus exercised is a power which it exclusively lies within the province of the States to exert, for it is elementary that the regulation of domestic corporations is not confided to the national legislature.

Again only corporations engaged in a certain character of business are taxed. Labor, agricultural and horticultural organizations, fraternal and benevolent societies and domestic building and loan associations, are exempted from the operation of the law. If these exemptions are justified it would likewise be possible for the Federal government to exempt from the operation of the law any other class of corporations. Railroad corporations, for example, might be either exempted or included, and insurance companies vice versa might be either included or exempted. Indeed, it would be possible for the Federal government to impose the corporation tax solely upon public service corporations such as the Interborough Rapid Transit Company, here, exempting from its operations, corporations of all other classes. In seeking, however, a con-

crete illustration of the inequality of this law nor
better indeed is to be found than that broad i
equality frankly recognized by the law itself, whic
taxes the artificial entity known as a corporatio
when engaged in an industry or a partnership, whe
organized in the form of a partnership associatio
and exonerates from taxation all other characte
of partnerships and all individuals engage
in the same business. It ought not to be doubte
that an Act of Congress which imposed a tax upo
dark haired persons and exempted from taxatio
persons of light complexion, would be beyond th
powers conferred upon Congress to impose a tax
but if this proposition be true, it can hardly b
seen how the power resides in Congress to impos
upon corporations alone a tax so unequal in i
bearing upon the business life and industry of th
country as is the tax now before the Court.

Conclusion.

In concluding the argument of this case, th
writer ventures to recall this Court's own cha
acterization of the equal balance it has ever mai
tained in adjusting the delicate relations existi
between State and National governments, with r
spect to their independent sovereign powers. In th
Slaughterhouse Cases, 16 Wall., 36, 82, this Cou
closed as follows:

> "Under the pressure of all the excite
> feeling growing out of the war, our state
> men have still believed that the existence
> the States with powers for domestic and l
> cal government, including the regulation
> civil rights—the rights of person and
> property—was essential to the perfect wor
> ing of our complex form of governmen
> * * *
>
> "But whatever fluctuations may be see

in the history of public opinion on this subject during the period of our national existence, we think it will be found that this Court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts."

Respectfully submitted,

RICHARD REID ROGERS,
of Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM.

No. ~~796.~~ 442

ARTHUR LYMAN AND ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, deceased, APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY *Et Al.*

Appeal from the Circuit Court of the United States for the Southern District of New York.

Involving the power of Congress to tax the franchises of a tax exempt State corporation especially chartered to operate a rapid transit railroad owned by the City of New York.

BRIEF OF APPELLANTS ON RE-ARGUMENT.

RICHARD REID ROGERS,
Of Counsel for the Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, No. 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF GEORGE BATY BLAKE, DECEASED, APPELLANTS,

VS.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANTS ON RE-ARGUMENT.

In 1891 the Legislature of the State of New York enacted a law known as the "Rapid Transit Act" (Laws of 1891, Chapter 4), whereby it was provided that cities having a population in excess of one million inhabitants, through Boards to be known as Rapid Transit Commissioners, might establish routes, obtain the necessary consents of the local authorities and property owners, prepare plans and specifications, and enter into contracts for the construction of underground rapid transit railroads. Under a subsequent provision of the law (Law of 1894, chapter 752, section 63), authorizing the submission of the question to the people, the citizens of New York City determined that the subways of that City should be constructed for and at the expense of the City. A contract was

thereupon entered into with one John B. McDonald for the construction of the subways and their maintenance and operation, for a period of 50 years. Sections 11 to 24, inclusive, of the Rapid Transit Act, contemplated, however, the organization of a corporation "to construct and operate such rapid transit railway or railways and to enjoy and exercise the rights and privileges and franchises in this Act provided for." Under authority of this provision the respondent was therefore incorporated upon May 6, 1902, and on July 10, 1902, under authority of law, received from McDonald an assignment of the operating part of his contract with the City, the construction part of which was carried out by McDonald in person. The Interborough Company thereupon provided the equipment necessary for the operation of the subways and since that time has been exclusively engaged in the rapid transit business in New York City. Section 35 of the Rapid Transit Act, under which the subways were constructed and the respondent incorporated, provided that the corporation contracting to operate the subways "shall be exempt from taxation with respect to its interest under said contract and with respect to the rolling stock and all other equipment of said road"; and this exemption has been sustained by the Courts of New York in the case of the *People ex rel. Interborough Rapid Transit Company* v. *State Board of Tax Commissioners*, 126 App. Div., 610, s. c. 195 N. Y., 618. Since the original subway was put into operation, an extension thereof under the East River into Brooklyn has been constructed and is now likewise operated by the respondent. The respondent's capital stock has a par value of $35,000,000, and its average fixed indebtedness during the year ended December 31, 1909, was $36,677,667. The tax that the company would be compelled to pay for the last calendar year, after making all deductions to which it would

be entitled under the Act of Congress imposing the special excise tax upon corporations, would exceed $50,000.

The appellants, stockholders of the respondent, and representing a large majority of the stockholders of that company, believing that the tax imposed upon the company by the Act in question was both unconstitutional in its general aspects, and if not broadly unconstitutional was at least unconstitutional in so far as it applied to the Interborough Rapid Transit Company, an agency of the State Government engaged in carrying on a public undertaking, requested the directors not to make the return nor to pay the tax required by the law in question. The directors having in view, however, the fact that the constitutionality of the law, either generally speaking, or with respect to this particular company, had not been passed upon by any court of competent authority, declined to subject the corporation to the penalties imposed by the law for failure to comply therewith. The present proceeding was thereupon taken out and the case has been brought into this court. The error assigned is the unconstitutionality of the Act of Congress of August 5, 1909.

In view of the large number of counsel who will appear in other cases before this court involving the same general questions, it is not proposed in this brief to argue all of the aspects of this case from which it might appear that the Act of Congress of August 5, 1909, was unconstitutional. On this particular appeal the discussion will be confined to the following propositions:

(1) The Act of Congress is unconstitutional, inasmuch as in effect it imposes a tax upon the reserved powers of the States to create corporations and endow them with franchises which are in themselves attributes of sovereignty.

(2) The Act of Congress is unconstitutional with especial reference to the Interborough Rapid Transit Company, the respondent herein, inasmuch as it imposes a tax upon a public agency engaged in carrying on a municipal, and therefore, under the decisions of this Court, a State enterprise.

(3) The Act of Congress is unconstitutional insofar as it attempts to impose a tax upon the franchises of foreign corporations, or at least upon their right to carry on a purely intra-state business—a matter over which the Federal Government has no control. The whole Act, therefore, must fail, inasmuch as it cannot be assumed that Congress intended to pass a law which would place State corporations at a disadvantage with respect to foreign corporations engaged in the same character of business.

(4) The tax is so unequal that by definition it is not a tax within the delegated power of congress to impose.

The argument of this brief will be centered principally upon the second of the foregoing propositions.

Nature of the Tax.

The Act of Congress provides generally that every corporation "shall be subject to pay a special excise tax with respect to the carrying on or doing business by such corporation, equivalent to 1 per centum upon the entire net income over and above $5,000 received by it from all sources during the year." Is the tax thus imposed (a), a tax upon corporate income; (b) an occupation tax; (c) a tax upon franchises as property; or (d) a tax upon the existence of corporations or partnership as-

sociations as such, or, as it is sometimes expressed, a tax upon the right to do business in a corporate or associated form?

If, following the suggestion of this court in the case of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 580, 583, and the even more pertinent suggestion in *Galveston, etc., Ry. Co.* v. *Texas*, 210 U.S. 217, 227 where a tax *equal* to a percentage of gross receipts was held to be a tax on gross receipts, the substance and not the letter of the statute be regarded and the tax be looked upon as a tax upon *income*, it must necessarily follow that the tax is unconstitutional because in many cases it will be found to be a tax upon the income of corporations derived from real or personal property or municipal securities or other property beyond the taxing power of Congress, and is not apportioned among the States according to population. In the particular case of the Interborough Rapid Transit Company, if the tax be a tax imposed upon its income, it is proper to point out that its income is derived almost exclusively from its special franchises, and that these franchises are expressly declared by the laws of the State of New York (Laws of 1896, chapter 908, subdivision 3, as amended by Laws of 1899, chapter 712) to be real estate.

The tax, however, in terms, purports to be "a special excise tax with respect to the carrying on or doing business" by corporations. If a tax imposed upon the deposits of a savings bank is a tax upon the franchise of the bank, as was held in *Society for Savings* v. *Coit*, 6 Wall., 594, or, if a tax upon the accounts of depositors equal to a given percentage of the amount of the deposits is likewise a franchise and not a property tax, as was held in *Provident Institution* v. *Massachusetts*, 6 Wall., 611, or if a tax upon the dividends or coupons payable by a corporation is an excise tax on

the corporation as was held in *R. R.* v. *Collector*, 100 U. S., 595, 598, it may be that a tax which by its terms, purports to be an excise tax, should be so regarded. Assuming then, without further argument of this point, that the tax in controversy is an excise tax and, therefore, need not be apportioned among the States according to population, the particular thing upon which this excise tax is imposed, remains to be considered.

In this aspect it seems certain that the tax cannot be considered an *occupation* tax, such as was the tax imposed upon "every person, firm, corporation or company carrying on or doing business of refining sugar," which was considered by this Court in *Spreckles Sugar Refining Co.* v. *McLain*, 192 U. S., 397, and held to be an excise tax "in respect of the carrying on or doing business of refining sugar." The law clearly does not impose any tax upon any business or any occupation as *such*. This follows not only from the obvious fact that no business or occupation is specified, but also from the circumstance that if any occupation or business were in fact subjected to the tax, every person engaged in that occupation or business would have to pay it, whereas under the law as it stands, only corporations and joint stock companies or associations pay the tax, and that quite irrespective of the business or occupation in which they may be engaged.

Neither does it seem possible to infer that the tax imposed by the Act of Congress is a tax upon corporate franchises as *property*. It is undoubtedly true that the courts have recognized the distinction between the sovereign franchises of a corporation, or its right to be a corporation, and the special franchises enjoyed by it which are treated as property and which may be separately taxed. *Farrington* v. *Tenn.*, 95 U. S., 679, 687; *Vcazie Bank* v. *Fenno*, 8 Wall., 533, 548. But if this be true, it is neverthe-

less manifest that corporate franchises under the Act of Congress under consideration are not taxed as property, inasmuch as, quite to the contrary, the language of the Act imposes an excise tax upon corporations with respect to their carrying on or doing business. If the tax were indeed a *direct* tax upon franchises as *property*, it would then follow that the law must be unconstitutional, particularly with respect to the corporation involved upon this appeal, because the tax is not apportioned according to population. The principal franchise enjoyed by the Interborough Company is its franchise to operate a public service rapid transit railroad under the streets of the City of New York; and this franchise, as already stated, has been expressly declared by the State of New York to be real property.

The tax, therefore, can only be an indirect tax upon the right to do business as a corporation; and such, indeed, is the tax by the definition of the statute itself.

We are thus brought to the consideration of the first point.

I.

THE ACT OF CONGRESS IS UNCONSTITUTIONAL, INASMUCH AS IN EFFECT IT IMPOSES A TAX UPON THE RESERVED POWERS OF THE STATES TO CREATE CORPORATIONS AND ENDOW THEM WITH FRANCHISES WHICH ARE IN THEMSELVES ATTRIBUTES OF SOVEREIGNTY.

The tax in terms is a tax imposed upon corporations with respect to their carrying on or doing business; but it is obvious that it is really a tax upon the power of the State governments to *create* corporations, inasmuch as if a corporation can be taxed as such for carrying on its business as a cor-

poration, and if the power to tax involves, as has been so often stated by this Court, the power to destroy, then, necessarily, the power of States to create corporations may likewise be destroyed under the guise of a similar taxation.

For of what value would be a grant of corporate franchises to a private corporation, if the corporation in the very act of enjoying those franchises could be taxed out of existence? The argument at this point clearly falls under the principle so often asserted by this Court, and aptly stated by Justice BROWN, in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S., 601, 691, that "a tax upon an incident to a prohibited thing is a tax upon the thing itself; and if there be a total want of power to tax the thing, there is an equal want of power to tax the incident." See *Brown* v. *Maryland*, 12 Wheat., 419, holding that a license tax upon an importer was a tax upon imports; *Weston* v. *Charleston*, 2 Pet., 449, that a tax upon stock for loans to the United States was a tax upon the functions of the Government; *Dobbins* v. *Commissioners*, 16 Pet., 435, that a tax upon the salary of an office was a tax upon the office itself; *Passenger Cases*, 7 How., 283, that a tax upon alien passengers arriving in ports of the State was a tax upon commerce; *Almy* v. *California*, 24 How., 169, that a stamp tax upon bills of lading was a tax upon exports; *Crandall* v. *Nevada*, 6 Wall., 35, that a tax upon railroads and stage companies for every passenger carried out of the State was a tax on the passenger for the privilege of passing through the State; *Cook* v. *Pennsylvania*, 97 U. S., 566, that a tax upon the sale of goods was a tax upon the goods themselves; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S., 34, that a tax upon Pullman cars running between different States was a tax upon interstate commerce; *Leloup* v. *Mobile*, 127 U. S., 640, that a license tax upon

telegraph companies was a tax upon interstate commerce; and *Galveston, Harrisburg, etc., Ry. Co.* v. *Texas*, 210 U. S., 217, that a tax upon *intra*-State railroad companies handling *interstate* business *equal* to one per centum of their gross receipts, was likewise a tax upon interstate commerce.

Now, that a grant of a corporate franchise is, (a) the exercise of a sovereign faculty, and (b) that this power was not alienated by the several States to the national Government, are propositions too plain for discussion.

a. In *California* v. *Pacific R. R. Co.*, 127 U. S., 1, 40, Justice BRADLEY, speaking for this Court, inquired:

> "What is a franchise? Under the English law, Blackstone defines it as 'a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject.' (2 Bl. Com., 37.) Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls

> for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic, without legislative authority. Corporate capacity is a franchise."

b. Upon the other hand, in *Briscoe* v. *Bank of Comth. of Ky.*, 11 Peters, 257, this Court held that a State possessed the power to charter a bank, that the power was an incident to sovereignty, and that there was no limitation in the federal Constitution on its exercise by the State.

The language of the dissenting judges in *Veazie Bank* v. *Fenno*, 8 Wall., 533, 555, is likewise pertinent in this connection, inasmuch as on this point they did not express a doctrine upon which the majority was in disagreement with them. After commenting upon the effect of the decision in *Briscoe* v. *Bank of the Commonwealth of Ky.*, as stated above, they went on to say:

> "As we have seen, in the forepart of this opinion, the power to incorporate banks was not surrendered to the Federal Government, but reserved to the States; and it follows that the Constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them. The question as to the taxation of the powers and faculties belonging to governments is not new in this Court."

The justices complained that the effect of the

main decision was not only to strike down the power to create banks, but

> "the power to create any other description of corporations, such as railroads, turnpikes, manufacturing companies, and others,"

and that the

> "taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority."

The main opinion in *Veazie Bank* v. *Fenno*, evaded this issue, although it conceded that when franchises were conferred for the purpose of giving effect to some reserved power of a State they were not proper objects for taxation.

If, then, the tax is essentially a tax imposed upon the full enjoyment of a sovereign prerogative, and is therefore a tax upon the exercise by the sovereign of the right to confer that prerogative; if this right is a reserved right of the several States under the Constitution; and if the Federal taxing power, though comprehensive in terms, is yet so circumscribed that it cannot be employed to destroy the exercise by the States of a sovereign function;—it necessarily follows that the law in question is unconstitutional.

A fresh light, however, will be thrown upon this subject, if we consider those cases in which it has been held that the States cannot even *indirectly* tax a corporate franchise granted by the national Government; and then turn to the consideration of the converse proposition that a fran-

chise of a State is entitled to as much protection from the Federal Government as is a franchise of the Federal Government from any one of the States.

McCulloch v. *Maryland*, 4 Wheat., 316, holding that the State of Maryland might not tax the notes of the banks of the United States, is the earliest and the greatest case which establishes the first postulate of this syllogism. But there are others—*Osborne* v. *Bank of U. S.*, 9 Wheat., 768; *Brown* v. *Maryland*, 12 Wheat., 419; *Weston* v. *The City of Charleston*, 2 Pet., 449; *Bank of Commerce* v. *New York*, 2 Black., 628; *Bank Tax Case*, 2 Wall., 200; *Owensboro National Bank* v. *Owensboro*, 173 U. S., 664; *First National Bank of Louisville* v. *Stone*, 174 U. S., 438; culminating in *California* v. *Pacific R. R. Co.*, 127 U. S., 41—perhaps even more pertinent. How firmly the doctrine has been established by this Court may be gathered from the forcible language employed by Justice BRADLEY, in delivering the opinion of the Court in the case last mentioned:

> "Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States, may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject."

This case, it should be borne in mind, was not a case involving the protection of the corporate powers of a corporation of the United States, but

the protection of a franchise—a franchise to extend its road as a connecting link of interstate commerce from California to Utah—that was bestowed upon a State corporation by an Act of Congress. The foregoing passage from Justice BRADLEY'S opinion was quoted with approval by this Court in *Central Pacific R. R. Co.* v. *California*, 162 U. S., 91, 124, where the Court concluded:

> "Thus it was reaffirmed that the property of a corporation of the United States might be taxed, though its franchises, as, for instance, its corporate capacity and its power to transact its appropriate business and charge therefor, could not be."

In view of these decisions, it would seem to be impossible to doubt the invalidity of an Act of the State of New York, which, over the objection of the Congress of the United States, might impose a tax upon a corporation organized by the United States for the purpose of building, let us say, an interstate railroad through the State of New York, with respect to "the carrying on or doing business by such corporation." See *Leloup* v. *Port of Mobile*, 127 U. S., 640, 648. Indeed, the decisions of this Court may be said to establish the proposition that, while the franchises of a corporation of the United States may never be taxed by a State government, not even the property of a corporation of the United States may be taxed if Congress should declare it to be exempt.

In *Thomson* v. *Pacific R. R.*, 9 Wall., 579, 588, Chief Justice CHASE, delivering the opinion of the Court, said:

> "We do not doubt, however, that upon the principles settled by that judgment (*McCulloch* v. *Maryland*), Congress may, in the exercise of powers incidental to the express

> powers mentioned by counsel (power to regulate commerce and establish post-offices and post-roads), make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; *and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them.*"

And in *Central Pacific R. R.* v. *California*, *supra*, the Court was careful to say:

> "Of course, if Congress should think it necessary for the protection of the United States to declare such property exempt [the property of federal corporations] that would present a different question."

The right of Congress to exempt the property and operations of its own incorporations from State taxation and control by a specific declaration to that effect was likewise recognized in *Reagan* v. *Mercantile Trust Co.*, 154 U. S., 413, 415, 416.

But if a State government cannot tax the franchises or operations of a national corporation chartered to assist the National Government in the discharge of a delegated power, by what better right may the National Government tax the franchises or operations of a State corporation chartered to assist a State Government in the discharge of a reserved power?

If any rule of correlative limitations between the Government of the United States and the governments of the respective States were well established, it would seem to be this: that in the respect stated, the State and Federal Governments are

upon an equal footing. The authorities to this effect are numerous and to the point: *Collector* v. *Day*, 11 Wall., 113, 128; *R. R. Co.* v. *Peniston*, 18 Wall., 30; *Van Brocklin* v. *Tenn.*, 117 U. S., 151, 162; *The Income Tax Cases*, 157 U. S., 584; *Knowlton* v. *Moore*, 178 U. S., 41, 59; *Plummer* v. *Coler*, 178 U. S., 115, 117; *Ambrosini* v. *U. S.*, 187 U. S., 1, 7; and *South Carolina* v. *U. S.*, 199 U. S., 487. They will be considered in detail in the discussion of the succeeding point of this brief. They may be said, however, to be epitomized in the early statement of the Court in *R. R. Co.* v. *Peniston*, 18 Wall., 1, 30, that:

> "While it is true that Government [the Government of the United States] cannot exercise its powers of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the national Government."

It would, therefore, seem to follow that under the principle of reciprocity which forbids a State Government from taxing the franchises of a Federal Corporation, or its operations, the Federal Government is equally inhibited from taxing the franchises or operations of a corporation organized under the laws of one of the several States.

II.

THE ACT OF CONGRESS IS UNCONSTITUTIONAL WITH ESPECIAL REFERENCE TO THE INTERBOROUGH RAPID TRANSIT COMPANY, THE RESPONDENT HEREIN, INASMUCH AS IT IMPOSES A TAX UPON A PUBLIC AGENCY ENGAGED IN CARRYING ON A MUNICIPAL, AND THEREFORE, UNDER THE DECISIONS OF THIS COURT, A STATE ENTERPRISE.

The argument of the preceding point has been broad enough, if sound, to cover the case of all corporations organized under the laws of any State, in whatever business they may be engaged. It is now proposed to consider the special case of the Interborough Rapid Transit Company, and to show that, whatever the general rule, this company falls within the particular rule established by this Court, that Congress has not the power to tax the franchise of a State corporation expressly created for the purpose of carrying on a public work, and expressly exempted from taxation with respect to its franchises and such portion of its property as may be engaged therein.

If, as has been held by numerous decisions of this Court, a railroad chartered by the Congress of the United States, employed to transport the mails of the United States, or its troops and munitions of war, and engaged in conducting broadly an interstate commercial business, notwithstanding the fact that its existence is due to private initiation, and its profits are distributed to private investors, is nevertheless an agency of the Federal Government, so that its right to exist and carry on its work cannot be taxed by any State government—upon what ground can it be justly claimed that the corporation involved in this appeal—the Interborough Rapid Transit Company—is not likewise a governmental

agency engaged in carrying on a public enterprise for the City of New York? It has long since been established by the decisions of this Court that a municipality is but the arm of a State government, that a municipal undertaking is a public undertaking of the State, and that, therefore, municipal property and municipal agencies enjoy the same protection from Federal taxation as the property and agencies of the State itself. If any authority were needed to show that the Interborough Rapid Transit Company is a public agency in the broadest sense, in a sense equally as broad as that in which the Pacific Railroad companies for example have been asserted to be Federal agencies—it will be found in the Acts of the Legislature of the State of New York, which authorized it to be incorporated for the express purpose of bringing to the great metropolis of that State the sorely needed relief of rapid transit; and in the further provisions of the law, exempting from taxation, not only its personal property employed in the operation of the subways, its machinery, rolling stock and equipment, but also its contract interest in the road itself. This exemption from taxation and the public character of this company have stood the test of the courts of the State of New York. In *People ex rel. Interborough R. T. Co. v. Tax Commissioners*, 126 App. Div., 610, affirmed without opinion by the Court of Appeals of New York, there was involved the right of the Interborough Company to be exempt with respect to its special franchise to operate a railroad under the streets of New York City. The language of the Appellate Division in that opinion fully states the Company's case:

> "A special franchise of a railroad is its right to construct, maintain and operate a railroad in public streets, highways or pub-

lic places. (*People, ex rel., Met. St. R. Co. v. Tax Comrs.*, 174 N. Y., 417, 435, 436.) By the Rapid Transit Law and the Acts amendatory and supplemental thereto, the special franchise as well as the road itself is the property of the City, and is merged in and became a part of the public highway for the public use.

* * * * *

"The City itself was not given the power of a railroad corporation, and, was, therefore, incapable, except through the contract which the statute authorized, of making this public work available for public use. For the purposes of this case it is unnecessary to determine whether the relator is technically a lessee, an operator or a separate contractor who performs a public service which the City could perform only through the agency of another, and the performance of which it was its duty to provide. However the matter is viewed, we find a public highway, operated in the manner required by the statute and the commission in charge of it, the operator paying a fixed sum to the City for the use of the property and the balance of the fares are held by it for performing the public service.

* * * * *

"If the City had been given power to operate this road, it is clear that no franchise tax could be charged against it. As the City can only operate it through another, it would seem to follow that the operator for the City is also exempt from taxation. The general scheme of the statute under which this subway was built was: The City bonded itself to pay for the construction of the road, which bonds, with interest thereon, are to be paid by the operation of the road, so that at the end of the lease or contract for operation, the City will own the road free of cost. It was, therefore, necessary, in order to make the scheme available, to find a contractor who would agree to construct, maintain and op-

> erate the road upon terms which the statute permitted the City to make. A statute declaring the property of a municipality free from taxation, which property it can only use through the services of a special contractor or lessee, confers no benefit upon the City if the contractor or lessee is to be taxed for using the property, as the amount of the tax would necessarily affect the rental which the City may receive. The statutory exception, therefore, is meaningless, unless it exempts the property from taxation when applied to the only use and in the only manner in which the City could use it."

We, therefore, have in the present case not only an appropriate agency of the State for the purpose of carrying on a public enterprise, but an indispensable agency; for the municipality, as stated by the Appellate Division, had not the authority to operate the road itself, and the Rapid Transit Act of the State of New York provided that it could be operated only by a corporation organized under that Act.

Nor is the exemption from taxation important only as showing the public character of the Interborough Company. It is likewise important as an inhibition. If it be true, as stated in the cases cited under the foregoing point, that even the property owned in a private capacity by a corporation organized by the Government of the United States and engaged in a national undertaking cannot be taxed by a State, if the Federal Government should so declare, the statement is justified by the parity of reasoning which pervades the consideration of this whole question, wherever the correlative rights of the State and Federal governments are involved, that the solemn declaration of the State of New York that this corporation should not be taxed, withdraws it from the category of subjects upon

which the Federal Government may justly impose an excise tax, even if that right otherwise existed.

The public character of this Company having been thus defined by the legislature and the courts of New York, and being apparent from the nature of the Company, it is proper to now pass in review the cases in which the general principle has been asserted by this Court that the public agencies of a State, or of a municipality of a State, may not be taxed by the Federal Government.

In *Veazie Bank* v. *Fenno*, 8 Wall, 533, 547, where the Supreme Court sustained a tax of 10 per centum upon the notes of State banks issued for circulation, upon the ground that the tax was a property tax, the Court nevertheless safeguarded the rights of the State in a situation, whereof the present case is a concrete example, by saying:

> "It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress."

In *The Collector* v. *Day*, 11 Wall., 113, 125, it was held that the salary of a state judge was exempt from national taxation. The Court said:

> "It would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which

> power acknowledges no limits, but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

In *United States* v. *Railroad Company*, 17 Wall., 322, was involved the right of the Federal Government to impose a tax on money due from the Baltimore & Ohio Railroad Company to the City of Baltimore. It was held that the City was a part of the State in the exercise of a limited portion of the State's powers and that the tax could not be sustained. The Court said (p. 327):

> "The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization * * *

To the same effect was *United States* v. *Louisville*, 169 U. S., 249.

In *Mercantile Bank* v. *New York*, 121 U. S., 138, 162, it was held that the United States could not tax the bonds issued by a State, or under its authority, and held by private corporations.

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 584, the only point upon which the entire court concurred, was upon the lack of authority to include as taxable income the income derived from interest on municipal bonds.

The foregoing cases on principle seem to be in point; but on the facts it may be admitted they are not so applicable to the situation of the Interborough Company as are those cases in which it has been held that a privately owned bank, organized under the laws of the United States by virtue of its power to regulate the currency, or a privately owned railroad company, chartered by Congress in the exercise of its power to regulate commerce between the States, is such an agency of the Government, that neither its franchises, its operations, nor, if so declared by Congress, its separately owned property, may be taxed by a State government.

These cases have already been partly cited in detail. Their general doctrine may be said to be aptly summarized by Chief Justice CHASE in *Van Allen* v. *The Assessors*, 3 Wall., 573, 591:

> "That Congress may constitutionally organize or constitute agencies for carrying into effect the national powers granted by the Constitution; that these agencies may be organized by the voluntary association of individuals, sanctioned by Congress; that Congress may give to such agencies, so organized, corporate unity, permanence, and efficiency; and that such agencies in their being, capital, franchises, and operations, are not subject to the taxing power of the States, have ever been regarded, since those decisions, as settled doctrines of this Court."

So, likewise, in *Railroad Co.* v. *Penniston*, 18 Wall., 1, 36, the Court, while recognizing, in the absence of a declaration by Congress to the contrary, the rights of States to tax the property of a Federal corporation, disclaimed the right of a State under any circumstance to impose a tax upon "the franchise or the right of the company to exist and perform the functions for which it was brought

into being"; and Justice BRADLEY, in his dissenting opinion, observed in this connection (p. 46):

> "Now, I think it cannot be doubted at the present day, whatever may have been contended in former times, that the creation of national roads and other means of communication between the States, is within the power of Congress in carrying out the powers of regulating commerce between the States, establishing post-offices and post-roads, and in providing for the national defense and for military operations in time of war. And no one will contend that, if the creation of a corporation is a suitable agency and means of carrying on the financial operations of the government, the creation of a corporation is equally apposite as an agency and means of carrying out the objects above mentioned."

And in *Luxton* v. *North River Bridge Co.*, 153 U. S., 525, 529, Justice GRAY, delivering the opinion of the Court, said:

> "The Congress of the United States, being empowered by the Constitution to regulate commerce among the several States, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end.
>
> * * * * * *
>
> "Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States."

See also *U. S.* v. *Union Pacific R. R. Co.*, 91 U. S., 92, and *U. S.* v. *Stanford*, 161 U. S., 412.

Indeed, the analogies to be drawn from the de-

cisions on Federal franchises so completely cover the case of the Interborough Company that it becomes important to inquire more minutely than heretofore to what extent the rule of reciprocity as to the mutual exception of the governmental agencies of the one government from taxation by the other has been established by the decisions of this Court. That a complete reciprocity does exist, notwithstanding an earlier dictum to the contrary, we think may now be said to be firmly settled by the force of the following authorities:

In *Collector* v. *Day*, *supra*, the whole decision was rested upon the application to the States of the converse of the proposition settled in *McCulloch* v. *Maryland*, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." Having first adverted to the dual system of State and Federal government under our Constitution the Court proceeded to say:

> "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments * * * should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax." * * *
>
> "And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preserva-

> tion, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution which prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentality of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

The scope of this decision and the pertinency of the principle to the exact issue presented on this appeal may be gathered from the dissent of Justice BRADLEY, wherein he queries—

> "Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation?"

The reciprocity rule was next asserted in the case of *Railroad* v. *Penniston*, 18 Wall., 30, as follows:

> "While it is true that government (meaning the government of the United States)

> cannot exercise its powers of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government."

In *Van Brocklin & Another* v. *State of Tennessee & Others*, 117 U. S., 151, 162, the Supreme Court quoted with approval the statement of the reciprocity rule in *Fagan* v. *Chicago*, 84 Illinois, 227, 233, 234, as follows:

> "Nor under our system of government can the State tax the general government, its agents or property, nor can the general government tax the States, their agents or property."

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 584, the rule was stated thus:

> "As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

In *Plummer* v. *Coler*, 178 U. S., 115, 117, the Court reaffirmed the doctrine by reference to the foregoing authorities, and declared:

> "The reasoning upon which the two lines of decision proceed is the same."

In *Knowlton* v. *Moore*, 178 U. S., 41, 59, the doctrine of reciprocity was recognized in the following language:

> "This proposition is supported by a reference to decisions holding that the several States cannot tax or otherwise impose burdens on the exclusive powers of the National government or the instrumentalities employed to carry such powers into execution, and, conversely, that the same limitation rests upon the National government in relation to the powers of the several States."

In *Ambrosini* v. *United States*, 187 U. S., 1, 7, it was held that good behavior bonds required to be given by liquor dealers to the City of Chicago, were exempt from the stamp tax imposed during the Spanish-American War. The Court said:

> "The general principle is that the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the Federal Government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter."

Even in the case of *South Carolina* v. *United States*, 199 U. S., 452, 453, 454, a case to which more extended reference will hereafter be made, it was fully recognized that:

> "the two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers."

and that

> "Each State is subject only to the limitations prescribed by the Constitution and

> within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that 'the United States shall guarantee to every state in this Union a republican form of government.' Art. 4, sec. 4. That expresses the full limit of National control over the internal affairs of a State."

It does not seem possible that the case of *South Carolina* v. *United States*, *ubi supra*, was intended to establish an opposite rule or that in view of the many decisions already cited to the contrary, it can be cited as an authority for the proposition, that the particular corporation involved in the case under discussion, to wit, the Interborough Rapid Transit Company, cannot properly be looked upon as an instrument employed by the State, "in the discharge of its ordinary functions as a government." It is true that in that opinion, although against strong dissent, it was stated that the decisions already referred to seemed to indicate that the thought had been that the exemption of State agencies and instrumentalities of National governments was limited to those of a strictly governmental character, and did not extend to those which were used by the State in carrying on an ordinary private business. But, assuming the correctness of this conclusion when applied to the case where the State or municipality engages in a private business primarily and principally for the sake of profit, it certainly has no application, unless the force of all the decisions heretofore adverted to be waived aside, to the case where the State or municipality derives no direct profit from a special enterprise and where the enterprise itself is carried forward in order to promote an important public undertaking properly falling within the domain of the State's powers of internal regulation. The analogy so often referred to between the Pacific railroads and the subways

of New York City is complete. In the case of Pacific railroads the actual profits from operation, as here, went chiefly to the corporations expressly chartered to carry on their operation, but so essential were they thought to be to the discharge of the general obligation assumed by the National government to foster and promote intercourse between the States, that the point was never seriously urged that they were not appropriate instrumentalities of National government to the accomplishment of that end. It is now too late to insist that a railroad built by a great City, owned by that City, and affording an absolutely indispensable facility for the daily intercourse of its citizens, is not likewise within the narrower limits of the internal affairs of State or City, which is an arm of the State, an appropriate agency of the State government. It would seem as though the case of *United States* v. *Railroad Company*, 17 Wall., 322-330, were conclusive upon this head.

The City of Baltimore had subscribed to the bonds of the Baltimore & Ohio Railroad Company, and it was held that these bonds were beyond the power of the Federal Government to tax. Referring to the public character of this investment, this Court said:

> "That the State possessed the power to confer this authority upon the City, we see no reason to doubt.
>
> "Was it exercised for the benefit of the municipality, that is in the course of its municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the City of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power? The legislature and the authorities of the City of

> Baltimore decided that the investment of $5,000,000 in aid of the construction of a railroad, which should bring to that City the unbounded harvests of the west, would be a measure for the benefit of the inhabitants of Baltimore and of the municipality. This vast business was a prize for which the States north of Maryland were contending. Should it endeavor by the expenditure of this money or this credit to bring this vast business into its own State, and make its commercial metropolis great and prosperous, or should it refuse to incur hazard, allow other States to absorb this commerce, and Baltimore to fall into an inferior position? This was a question for the decision of the City under the authority of the State. It was a question to be decided solely with reference to public and municipal interests. The City had authority to expend its money in opening squares, in widening streets, in deepening rivers, in building common roads or railways. The State could do these things by the direct act of its legislature, or it could empower the City to do them. It could act directly or through the agency of others. It is not a question to be here discussed, whether the action proposed would in the end result to the benefit of the City. It might be wise, or it might prove otherwise. The City was to reap the fruits in the advanced prosperity of all its material interests, if successful. If unsuccessful, the City was to bear the load of debt and taxation, which would surely follow. The City had the power given it by the legislature to decide the question. It was within the scope of its municipal powers."

The authority of this case was crystallized into legislation by the Act of Congress of February 25, 1893 (27 Stats, 477), directing a refund to the City of Louisville of the Federal tax imposed under the Internal Revenue Act of 1864, upon the stock of

the Louisville and Nashville R. R. Co. owned by the City. See *United States* v. *Louisville*, 169 U. S., 249.

Much other authority upon this point could be cited, but the power of subdivisions of a State Government, either counties, townships, or municipalities, to subsidize works of internal improvement, and, most of all, public improvements which facilitate the intercourse of citizens with each other, has long been an established principle of our polity. Had the principle not been early established and fully recognized, the vast development of this land and its political units could never have been assured, or must at least have been indefinitely postponed.

And this suggestion leads to another important aspect in which the South Carolina Dispensary case may be distinguished from the case at the bar. It was there held that the Constitution should be interpreted in the light of the circumstances surrounding its framers, and it was suggested that when the Constitution was adopted, "there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plan of a body politic to take up the work of the individual or body corporate." It was therefore argued that when the framers of the Constitution conferred upon the National government the power to impose license taxes, they could not have supposed that the State governments by extending their functions to ordinary commercial operations would limit or destroy this power; but this argument can scarcely be applied with respect to the ordinary routes of communication which from time immemorial have always been looked upon as proper objects of public ownership and of public control. At the time the Constitution was adopted, the nearest approach to the railroads of

today were the public roads of that era, and these were universally under the control of the State Governments or subdivisions of the State Governments. Canals and post-roads were already under governmental protection the world over, and although the power to establish post-roads was committed to Congress, there can scarcely be a doubt that the States recognized as well as retained their rights to improve the avenues of internal communication. It cannot, therefore, be said that when the Constitution was adopted its framers did not contemplate that the power of the State might be extended to the creation of improved facilities for travel and communication, and, indeed, the Constitution was scarcely in existence when, prior to the beginning of the railroads, an extensive system of artificial water communication was put into force chiefly through the aid or by the direct appropriations of the State Governments. New York was one of the first to exercise in this respect its governmental functions, and the Erie Canal was formally proposed as a State undertaking in the year 1791.

But probably the most obvious distinction between the South Carolina case and that of the Interborough Company is to be found in an application of the rule, well established by this Court, that if a thing itself cannot be taxed, neither can an incident essential to the enjoyment of the thing be taxed. The liquor business, of course, has always been subject to taxation, and, therefore, the right to carry on that business must be subject to taxation as well, even though it be carried on by a sovereign State itself; as otherwise, as Justice WHITE observed in commenting upon the *South Carolina* Case, in *Murray* v. *Wilson Distilling Co.*, 213 U. S., 151, 173, a State might "destroy a pre-existing right of taxation possessed by the Government of the United States." But a railroad owned by the

City of New York is not subject to taxation, nor in consequence can a corporation, expressly created to operate it and without which it could not be operated at all, be subjected to taxation when the State has declared to the contrary; for otherwise, to paraphrase the language of the Court in *Railroad Co.* v. *Penniston*, 18 Wall., 5, 36, the company would be "deprived of its power to serve the government as it was intended to serve it, and hindered in the efficient exercise of its power."

It is now proper to advert to the distinction made by Mr. Justice BRADLEY, in his dissenting opinion in *Railroad Company* v. *Penniston*, 18 Wall., 48, relying upon an observation made by Chief Justice MARSHALL, in *McCulloch* v. *Maryland*, 4 Wheat., 405. Justice BRADLEY in endeavoring to establish the proposition against the views of a majority of the court that not only the franchises of the Union Pacific R. R. Co., a National corporation, were exempt from State taxation, but the property owned by that corporation as well, was naturally led to consider the opposing argument that if the property as well as the franchises of a Federal corporation were exempt from State taxation, the property as well as the franchises of a State corporation should likewise be exempt from Federal taxation. He stated this question as follows:

> "But, it may be asked, if the States cannot tax a United States corporation created for public and national purposes, on what principle can the General government tax local corporations created by the State governments for local and State purposes? If the States cannot tax a National bank, how can the United States tax a State bank? The answer is very manifest, and is stated by Chief Justice MARSHALL, in *McCulloch* v. *Maryland*."

The learned Justice then proceeded to quote several extracts from *McCulloch* v. *Maryland*, of which the following was the most important:

> "It has also been insisted that, as the power of taxation in the General and State governments is acknowledged to be concurrent, every argument which would sustain the right of the General government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the General government. But the two cases are not on the same reason. The people of all the States have created the General government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

Manifestly the language employed by Chief Justice MARSHALL was unnecessary to the decision of the case before the Court. In answer to it, it can only be said that this dangerous dictum, notwithstanding the elevated source from which it proceeded, has never been applied as a principle of any de-

cision rendered by this tribunal. Indeed, the long line of cases beginning with *Collector* v. *Day*, 11 Wall., 113, 125, summarized above, are a direct negation of this doctrine.

The third and fourth propositions set forth in the beginning of this brief may be briefly stated.

III.

THE ACT OF CONGRESS IS UNCONSTITUTIONAL IN SO FAR AS IT ATTEMPTS TO IMPOSE A TAX UPON THE FRANCHISES OF FOREIGN CORPORATIONS, OR AT LEAST UPON THEIR RIGHT TO CARRY ON A PURELY INTRASTATE BUSINESS—A MATTER OVER WHICH THE FEDERAL GOVERNMENT HAS NO CONTROL. THE WHOLE ACT, THEREFORE, MUST FAIL, INASMUCH AS IT CANNOT BE ASSUMED THAT CONGRESS INTENDED TO PASS A LAW WHICH WOULD PLACE STATE CORPORATIONS AT A DISADVANTAGE WITH RESPECT TO FOREIGN CORPORATIONS ENGAGED IN THE SAME CHARACTER OF BUSINESS.

The Act of Congress of August 5, 1909, imposes a tax not only upon corporations of the United States or any State or Territory thereof, but also a special excise tax with respect to the carrying on and doing business of any corporation organized under the laws of any foreign country.

It is a proposition too plain for comment that no state can subject a non-resident to its sovereignty. It certainly is beyond the power of the Federal government to tax the franchises, for example, of a corporation of Great Britain. If the tax upon foreign corporations, therefore, is to be sustained, it must be upon the theory that the National government has authority to license foreign corporations to do business within the geographical limits of a State of the union. Indeed, the tax in terms pur-

ports to be a tax upon the right of a foreign corporation to carry on or do business within the United States, or any State or Territory thereof. If this right can be sustained, then it clearly falls within the power of the Federal government to prohibit by taxation a foreign corporation from transacting a wholly domestic business within the limits of any State of the United States. It can, for example, impose a tax upon the admission of a foreign Insurance Company to underwrite risks in the State of New York, and it can thus withdraw from the State the right to regulate its own internal commerce, a right which from the earliest days of the Republic has been universally conceded to lie within the sole jurisdiction and regulation of the several States. The authority of Congress to tax under any appropriate form an established business or occupation within its jurisdiction may be conceded; but it does not seem possible that any successful contention can be made that will uphold the authority of the United States to tax either the franchises of foreign companies as such or their primary right to carry on business of an exclusively domestic character within any given State. "The power to authorize a business within a state is plainly repugnant to the exclusive power of the State over the same subject." *License Tax Cases*, 5 Wall., 462, 471. See also *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S., 204, 210. The law, therefore, insofar as it applies to such companies, would seem to be unquestionably a law not lying within the delegated powers of the Federal government to enact.

But if that be true, the whole law would likewise seem to fail upon the principle sustained in the *Income Tax* cases, that where certain important sections of a law, constituting an entire scheme of taxation, are necessarily invalid, the whole law

must fall, because it cannot be assumed that the Legislature would pass the residuum independently of the parts which are held to be unconstitutional. There is a special force in the application of this principle to the law in question, provided the tax upon foreign corporations cannot be enforced, as, otherwise, all foreign corporations doing business within the confines of any State in the Union would have a distinct preference over domestic corporations, to wit, an exemption from taxation which domestic corporations could not enjoy. It certainly could not be assumed that Congress could have intended to produce any such result as this, or, that with any such situation before it, it would have enacted any part of the present scheme imposing a special franchise tax upon corporations.

IV.

THE TAX IS SO UNEQUAL THAT BY DEFINITION IT IS NOT A TAX WITHIN THE DELEGATED POWER OF CONGRESS TO IMPOSE.

It is true that the provision of Article I, Section 8, of the Constitution, that excise taxes must be uniform throughout the United States, has been held by this Court to mean a geographical uniformity. It is not, therefore, upon this section that the proposition is rested that the present law is unconstitutional, because unequal. The primary power delegated to the Federal government to impose taxes, carries with it the necessary implication that those taxes should be substantially uniform and equal, or, if unequal in part, that the inequality should be based upon some rational and clearly understood principle. It might be that the exemption of one particular corporation from taxation where another

is taxed may stand upon a rational basis. It may be that the exemption from taxation of corporations enjoying a net income of less than $5,000 a year is a rational exemption, inasmuch as it might be assumed that such weaker corporations should be fostered and encouraged; but the inequalities in the present law far transcend the principle of a rational inequality, and where they do not transcend that principle, clearly invade the jurisdiction reserved to the several States.

To illustrate: The present company does not enjoy the right, with other corporations, in arriving at the amount of tax it will have to pay to deduct the interest upon its bonded debt in excess of its capital stock. The only rational ground upon which this discrimination against corporations whose fixed indebtedness exceeds their capital stock can be rested, must be the ground that in the furtherance of a wise public policy it is advisable to restrict the indebtedness of corporations to an amount which shall not exceed their capital stock. This principle, indeed, has been made effective by recent legislation in several States; but the power thus exercised is a power which exclusively lies within the province of the States to exert, for it is elementary that the regulation of domestic corporations is not confided to the national legislature. *Central Pacific Railroad* v. *California*, 162 U. S., 91, 122.

Again only corporations engaged in a certain character of business are taxed. Labor, agricultural and horticultural organizations, fraternal and benevolent societies and domestic building and loan associations, are exempted from the operation of the law. If these exemptions are justified it would likewise be possible for the Federal government to exempt from the operation of the law any other class of corporations. Railroad corporations, for

example, might be either exempted or included, and insurance companies *vice versa* might be either included or exempted. Indeed, it would be possible for the Federal government to impose the corporation tax solely upon public service corporations such as the Interborough Rapid Transit Company, exempting from its operations, corporations of all other classes. In seeking, however, a concrete illustration of the inequality of this law none better indeed is to be found than that broad inequality frankly recognized by the law itself, which taxes the artificial entity known as a corporation when engaged in an industry or a partnership, when organized in the form of a partnership association, and exonerates from taxation all other character of partnerships and all individuals engaged in the same business. It ought not to be doubted that an Act of Congress which imposed a tax upon dark haired persons and exempted from taxation persons of light complexion, would be beyond the powers conferred upon Congress to impose a tax; but if this proposition be true, it can hardly be seen how the power resides in Congress to impose upon corporations alone a tax so unequal in its bearing upon the business life and industry of the country as is the tax now before the Court. This is not reasonable classification; it is mere "arbitrary selection." *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S., 150, 159; *Southern Railway Co.* v. *Greene*, 216 U. S., 400, 417.

Conclusion.

In concluding the argument of this case, the writer ventures to recall this Court's own characterization of the equal balance it has ever maintained in adjusting the delicate relations existing

between State and National governments, with respect to their independent sovereign powers. In the *Slaughterhouse Cases*, 16 Wall., 36, 82, this Court closed as follows:

> "Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government,
> * * *
>
> "But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this Court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts."

Respectfully submitted,

RICHARD REID ROGERS,
of Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. ~~700~~ 442

ARTHUR LYMAN AND ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, deceased, APPELLANTS.

vs.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the Southern District of New York.

STATEMENT FOR APPELLEES.

JAMES L. QUACKENBUSH,
Counsel for the Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF GEORGE BATY BLAKE, DECEASED,
APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, ET AL.,
APPELLEES.

Statement for Appellees.

The appeal herein is in an action which was brought by the appellants, who are stockholders in the defendant company to enjoin the Interborough Rapid Transit Company and its directors, the individual defendants herein, from voluntarily making the returns to the Collector of Internal Revenue required by Section 38 of the Act of Congress, entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, known as the Corporation Tax Law, on the ground that the portion of said Act which purports to provide for a special excise tax upon all corporations is repugnant to the Constitution of the United States. The action was commenced in the Circuit Court of the United States for the Southern District of New York, after the appellants had made formal demand upon the directors of the defendant company to take such steps as might be necessary

and proper to test the constitutionality of the Act hereinbefore referred to, and so protect the rights of individual stockholders by preventing a reduction of the company's income and the amount of such income applicable to dividends. The request of the appellants was fully considered by the directors of the defendant company, who, without committing themselves on the question of the constitutionality of the Act above referred to, decided that by reason of the penalties to which the company would become liable for failure to make the return and otherwise comply with the requirements of the Act, it would be inexpedient to take the course requested by the appellants, and accordingly a formal resolution to that effect was adopted.

In the court below a general demurrer was filed on behalf of the defendants and thereafter a decree was entered dismissing the bill, sustaining the demurrer and allowing an appeal direct to this Court.

Inasmuch as the Federal Government has intervened in this appeal, and in similar appeals now before this Court, by the Attorney General and the Solicitor General, who will defend the constitutionality of the said Act, counsel for the appellees herein submit only this brief statement in explanation of the position of the defendant company and its directors.

Respectfully submitted,

JAMES L. QUACKENBUSH,
Counsel for Appellees.